

IN THE MATTER OF THE HUMAN RIGHTS CODE, 1981
S.O. 1981. c. 53

IN THE MATTER OF A COMPLAINT UNDER THE HUMAN RIGHTS
CODE BY LINDA GUTHRO, COMPLAINANT AGAINST WESTINGHOUSE
CANADA INC., ITS SERVANTS OR AGENTS, ALLEGING
DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF SEX.
DATED FEBRUARY 18, 1982.

Place of Hearing: Hamilton. Ontario

Date of Hearing: August 21, 1990

Board of Inquiry - Morley R. Gorsky

Appearances

For the Commission - Mark Hart
Counsel

For the Complainant - S.Z. Pete Volaric

For the Respondent - Douglas K. Gray
Counsel

DECISION

By letter dated March 16, 1990, pursuant to subsection 37(1) of the Human Rights Code, 1981, c. 53, as amended (hereafter the "Code"). I was appointed by the Minister of Citizenship as a Board of Inquiry to hear and decide the complaint of Linda J. Guthro (hereafter the "Complainant"), filed with the Ontario Human Rights Commission (hereafter the "Commission"), dated February 18, 1982, which complaint was made against Westinghouse Canada, Inc. (hereafter called "Westinghouse"), alleging: discrimination on the basis of sex in respect of lay-offs in 1972, 1973, 1975 and 1976; discrimination on the basis of sex in the refusal to allow her to remain at a certain plant in 1977; and discrimination on the basis of sex and the refusal of promotions in 1979 and 1981. Attached hereto as Appendix "A" is a copy of the said complaint. My appointment as a Board of Inquiry relates only to this complaint.

The first hearing with respect to the complaint was convened by conference call on April 6, 1990, involving counsel of the Commission and the Respondent, and Ms. Guthro, who was unrepresented at that time. This hearing was for the purpose of fixing dates for the hearing and to deal with any preliminary matters.

At the commencement of the hearing, Ms. Bowlby, who was then acting as counsel for the Respondent, moved that I find that

a settlement, binding on the Commission, the Complainant and the Respondent had been concluded. She also moved that, should I find that such a settlement had been entered into and approved of by the Commission, that I exercise my discretion under section 4 of the Statutory Powers Procedure Act, (hereinafter, the "Act"), in favour of not proceeding to hear the complaint on its merits.

Following the hearing of April 6, 1990, I issued an Interim Decision, dated April 9, 1990, with respect to the hearing of the Respondent's motions, containing directions as to the way in which evidence would be adduced with respect thereto. All of the parties had indicated that they wished to proceed in the manner set out in the Interim Decision, a copy of which is attached as Appendix "B".

Janice Anne Baker, a partner with the solicitors for the Respondent, swore an affidavit on April 5, 1990, which, with exhibits attached, represented the evidence of the Respondent.

The affidavits of Joan Haberman, with exhibits attached, (sworn March 2 and June 12, 1990), who is a solicitor employed by the Ministry of the Attorney-General, who acted as counsel for the Commission in this matter, and the affidavit, with exhibits attached, of Selwyn McSween (sworn April 27, 1990), who was at all material times, the officer of the Commission responsible for investigating the complaint, represented the

evidence of the Commission.

The affidavit of Linda J. Guthro, the Complainant, sworn on May 31, 1990, together with exhibits attached, represented the evidence of the Complainant.

The hearing was reconvened on August 21, 1990, in order to hear the applications of the Respondent. All parties were represented by counsel at the reconvened hearing and presented oral argument and submitted authorities to me at that time. This further Interim Decision follows upon my consideration of the evidence, argument and authorities submitted to me.

I am satisfied that although the Complainant was represented by counsel, at least from February 23, 1983, the last communication from her counsel to counsel for the Respondent was on March 9, 1983, and that, thereafter, until she retained Mr. Volaric in April or May of 1990, she was never represented by any solicitor or representative, unless I find that she was represented by representatives of the Commission and/or counsel employed within the Ministry of the Attorney General.

On March 25, 1983, the Complainant filed a second complaint against the Respondent, alleging "reprisals", which is attached as Appendix "C". This complaint is not referred to in my appointment as a Board of Inquiry, and is not before me for

adjudication.

By letter dated May 12, 1988, Ms. Baker made lengthy submissions and an offer of settlement to the Commission in connection with both complaints.

On July 5, 1988, Ms. Baker wrote the Commission in connection with both complaints. Her letter is attached as Appendix "D".

On August 22, 1988, Ms. Baker received a letter from the Commission, dated August 8, 1988, indicating that the Commission had decided to request the Minister to appoint a Board of Inquiry with respect to the first complaint. The said letter is attached and marked as Appendix "E".

Ms. Baker wrote to the Commission on August 2 and August 23, 1988, in connection with both complaints. In the second letter, she increased the Respondent's offer to settle both complaints. The letters are attached as Appendices "F" and "G".

On October 25, 1988, Ms. Haberman received a package of material setting out the Respondent's settlement offer of \$7,500.00. The package consisted of the letters from Ms. Baker to the Commission dated May 12, 1988, July 5, 1988, August 2,

1988 and August 23, 1988, respectively attached as Appendices "H", "I", "J" and "K".

On November 1, 1988, Ms. Haberman wrote to Ms. Baker acknowledging receipt of the letters of May 12, July 5, August 2 and August 23, 1988, and indicated that the matter between the Complainant and the Respondent had been referred to her by the Commission for handling "on their behalf." She also indicated that she was "making arrangements to obtain instructions from [her] clients and from the complainant with respect to [the Respondent's] offer." It would appear from this letter that there was no direct representation being made, at this time, that Ms. Haberman was representing the Complainant.

Upon reviewing the Respondent's offer of settlement, Ms. Haberman raised certain questions with respect to the calculation of the Complainant's lost wages, which were set out in a letter to Ms. Baker, also dated November 1, 1988, attached as Appendix "L".

On November 25, 1988, Ms. Haberman received a letter from Ms. Baker, dated November 22, 1988, attached as Appendix "M", which provided a more detailed calculation of the Complainant's lost wages.

On December 13, 1988, Mr. McSween and Ms. Haberman met

with the Complainant for the purpose of discussing the Respondent's offer of settlement. Ms. Haberman's recollection, as set out in paragraph 9 of her first affidavit, was that the Complainant objected to the offer of settlement because it did not compensate her in respect of her allegations of discrimination raised in her first complaint for the period prior to 1981. Ms. Haberman stated that she explained to the Complainant that, in her view, a Board of Inquiry would not award compensation for the period prior to 1981, and she gave her reasons for this conclusion.

Ms. Haberman stated, in paragraph 10 of her first affidavit, that after much discussion, the Complainant reluctantly agreed to accept the Respondent's settlement offer. Ms. Haberman explained to the Complainant that minutes of settlement would be forwarded to her for her signature and also informed her: " . . . that, even before she signed the Minutes of Settlement, she 'had made a deal,' " as Ms. Haberman would be advising counsel for the Respondent that she had accepted the settlement offer.

A copy of Ms. Haberman's handwritten notes were attached to her affidavit and marked as Exhibit "D". My examination of the notes did not disclose any reference to the Complainant having been told that she had "made a deal." in the manner described in Ms. Haberman's affidavit.

In paragraph 11 of Ms. Haberman's first affidavit, she deposed that: "By letter dated December 20, 1988 to Ms. Guthro, I confirmed that she was prepared to accept the respondent's offer of \$7,500.00. I further stated that I was advising the respondent of her acceptance, and that I would be forwarding minutes of settlement to her for her signature in the near future." The said letter is attached as Appendix "N". I note that in the reference line, the only complaint that is referred to is number SW 2089, which is neither the number of the first or the second complaints, which are numbered, respectively : SW 2087 and SW 2340. It would appear that Ms. Haberman was referring to to first complaint, numbered SW 2087, and had, inadvertently, inserted a 9 for a 7.

There is a significant difference between Ms. Haberman and the Complainant as to whether both complaints were the subject of the settlement negotiations, and whether both claims were to be settled as a result of the settlement agreement. The Complainant stated, in paragraph 4 of her affidavit, that it was her: " . . . belief that the respondent's offer of \$7,500.00 was related to damages to which [she] was entitled as a consequence of the wage differential between [herself] and the Respondent's employee, Mr. Keay, from the year 1981 to the year 1986 [being the subject of the first complaint]." The Complainant deposed that the only complaint that was discussed with Ms. Haberman at

their meeting of December 13, 1988 was the first complaint, and there was no question in her mind about whether the second complaint was also to be settled by acceptance of the settlement offer from the Respondent.

It is evident from Ms. Haberman's supplementary affidavit that she agrees that only the first complaint was discussed during their meeting of December 13, 1988, and she so deposed in paragraph 5 of that affidavit. Ms. Haberman states that she had been retained as counsel only with respect to the first complaint. Although she deposed in paragraph 1 of her first affidavit that she had: " . . . acted as counsel for the Ontario Human Rights Commission . . . , " she clarified her position in paragraph 2 of her supplementary affidavit, where she stated that when the matter had been assigned to her in August of 1988, although there was reference to the filing of a "reprisal complaint" the file material did not contain " . . . a copy of that complaint nor any details in support of it." She requested Mr. McSween to advise her of what had become of the second complaint and requested a copy of the file. She suggested (in paragraph 2 of her supplementary affidavit): " . . . that if that matter was going to proceed, this complaint ought to be abeyed [sic] until the second complaint had been fully investigated so that the two could be brought to the Hearing stage together."

Because she heard nothing further from Mr. McSween regarding the second complaint, and as she had not received a copy of it, she: " . . . assumed that the second complaint had been abandoned." (Paragraph 3 of the supplementary affidavit of Ms. Haberman.) In paragraph 5 of her supplementary affidavit, Ms. Haberman alleged that: "As a result, it is inappropriate for Ms. Guthro to claim, in paragraph 13 of her Affidavit, that I had somehow confused one complaint with the other. Throughout my conversation with Ms. Guthro of December 13th, we discussed the first complaint only."

Without more, I would have concluded that there was an unfortunate breakdown in communications between Ms. Haberman and Ms. Guthro, with Ms. Guthro, not unnaturally, assuming that only the first complaint was being settled, and Ms. Haberman assuming that the settlement would end the matter, as she believed that the second complaint had been "abandoned".

It is evident that Ms. Haberman, during the meeting with the Complainant of December 13, 1988, was not at all concerned with the second complaint. She believed that it had been abandoned and that the only matter to be dealt with related to the first complaint. She may have very well indicated to the Complainant that " . . . the settlement which she was agreeing to would mark the end of her disputes with the respondents . . . ," but it is not at all clear to me that the Complainant understood

that a complaint, the status of which was not fully appreciated by Ms. Haberman, was a subject of their discussions. It is clear from the Complainant's affidavit that the only significant discussion that took place concerned the settlement of the first complaint.

It is also clear that the Complainant was extremely upset about her belief that her claim had not been properly dealt with by representatives of the Commission. Her agreement to the settlement was entirely related to the first complaint, and in orally agreeing to the settlement, she was very upset. What was in her mind was the failure on the part of representatives of the Commission to properly handle her first complaint. From Ms. Haberman's perspective, believing as she did that the second complaint had been abandoned, there would be no concern that any further claim existed which might be pursued by the Complainant.

By letter dated June 22, 1989, Ms. Haberman advised the Complainant that the Commission had approved the settlement and provided her with two copies of the minutes of settlement and a release for her to sign and return. The letter is attached as Appendix "O". The reference line of the said letter only referred to the first complaint (again referring to it, incorrectly, as number SW 2089).

The Complainant responded to the letter of June 22,

1989. and wrote to Ms. Haberman. in an undated letter, stating in the second paragraph: "I was unaware of the second complaint being included in the proceeding. As of yet [sic]. I have not even had a hearing regarding this matter and I am not prepared after all of this time to let it go unanswered." Ms. Guthro maintains that she had no knowledge that in orally agreeing to the settlement, she was agreeing to the settlement of both complaints.

Ms. Haberman then wrote two letters on September 26, 1989. One letter was to the Complainant in which she expressed surprise that Ms. Guthro would not have been aware: " . . . that both complaints were being discussed and were to have been disposed of at the same time." In the second paragraph of the letter, Ms. Haberman stated: "although I am not certain, I imagine that Mr. McSween would have shown you copies of the settlement offers in written form which were received from the Respondent. It is clear that in those documents that both complaint numbers were being dealt with."

In paragraph 17 of her first affidavit, Ms. Haberman stated that : "At the meeting on December 13, 1988, I did not discuss the reprisal complaint with Ms. Guthro because I had never seen it. Nonetheless, Ms. Guthro appeared to understand that the settlement was the only relief that she would receive from Westinghouse. As I state in the aforementioned letter, it

was clear to my mind that Ms. Guthro viewed the acceptance of the settlement offer as an end of the entire matter." A copy of the said letter is attached as Appendix "P".

In the letter to Mr. McSween (who left his employment with the Commission in July of 1989), a copy of which is attached as Appendix "Q", Ms. Haberman stated :

Ms. Guthro has now written to advise that she was surprised to see that both of her complaints were included in the Memorandum of Settlement and that she had no intention of settling her second complaint when negotiations were under way.

I was vaguely aware of the fact that there was a second complaint that had been filed and you will recall that I wrote to you by letter of September 2nd, 1988 at that time requesting a copy of the complaint as well as the file material which you had pertaining to it. I never received that material and consequently when we met with Ms. Guthro in December I did not address my mind to the second complaint and neither did she ." (emphasis added.)

I am satisfied that both Ms. Guthro and Ms. Haberman have accurately recounted what took place at the meeting of December 13, 1988, and what each of them believed had transpired. Ms. Haberman believed that there was only one outstanding matter (the first complaint), and, therefore, did not address her mind to the second complaint. When she referred to the settlement as settling all differences between Ms. Guthro and the Respondent, in her mind the only outstanding difference was the first

complaint. I am also satisfied that Ms. Guthro never regarded the second complaint as having been abandoned and, not unnaturally, focused on the complaint which was on her mind and which was clearly on Ms. Haberman's mind. I do not believe that Ms. Haberman ever intended her statement to encompass a claim that she believed had already been abandoned, and with respect to which she was only "vaguely aware." It is particularly significant that Ms. Haberman went on to say in her letter to Mr. McSween:

It is most unfortunate that I did not receive the material when requested as I would have been able to analyse it and discuss it with her at that time. Most likely, it would have been appropriate to settle the case in its entirety (both complaints) for what she was offered.

At the present time, however, as Ms. Guthro was not directing her mind to the settlement of the second complaint we have a real difficulty.

In a postscript to her letter to Mr. McSween of September 26, 1989, Ms. Haberman stated:

P.S. I enclose a copy of Ms. Guthro's letter to me. She is extremely annoyed at the way her original complaint was treated by the Human Rights Commission and with good reason. The fact that the original complaint was drafted incorrectly prejudiced her position. It seems she has further cause for complaint at this time. Please bear this in mind when you speak with her.

I enclose as well my response to Mrs. Guthro.

The response referred to is the letter attached to this decision as Appendix Q.

In his affidavit, Mr. McSween deposed that he was employed as an investigating officer at the Hamilton office of the Commission from 1982 until July of 1989, and that he was, at all material times, the officer responsible for investigating both complaints. In paragraph 3 of his affidavit, Mr. McSween deposed to a fact finding conference with respect to the first complaint which was held on February 14, 1983, attended by, among others, the Complainant and her then counsel, Clyde Halfour. It was at this conference that the allegations set out in the first complaint were reviewed with all parties and an invitation given to Complainant's counsel to submit a proposal for the settlement of that complaint.

Three days after the fact finding conference, the Complainant received a written warning from the Respondent and the second complaint was made on March 25, 1983.

A conciliation meeting was held on December 19, 1986. The meeting was attended by Mr. McSween, Ms. Guthro, who at this point was no longer represented by counsel, and Ms. Baker. I am satisfied from the statements made in paragraph 7 of Mr. McSween's affidavit that efforts were then made to settle both complaints and his handwritten notes of the discussions with the Complainant and Ms. Baker indicate that the resolution of both complaints was discussed.

In paragraphs 8 and 9 of Mr. McSween's affidavit, he indicates that he always considered both complaints together (after the filing of the second complaint) and he believed that the Complainant " . . . clearly understood that the ongoing settlement discussions encompassed both the main complaint and the reprisal complaint, and that a settlement would be a resolution of the entire matter."

In paragraph 9 of his affidavit, Mr. McSween referred to a telephone conversation with the Complainant which took place on December 11, 1984, in which she set out three terms for a settlement with the Respondent:

- (i) the removal of the bad record from her personnel file;
- (ii) a job in department 156;
- (iii) \$25,000.00.

Mr. McSween deposed: " . . . In this discussion, it is clear to me that Ms. Guthro was dealing with her disciplinary record which is the subject of the [second] complaint together with the claims arising from her allegations of sex discrimination which is the subject matter of the [first] complaint. My belief that Ms. Guthro understood that the settlement discussions encompassed the resolution of her entire dispute with Westinghouse, including the

[first] complaint and the [second] complaint, also is evidenced by the settlement proposal put forward by her at the December 19, 1986 conciliation meeting." Mr. McSween attached to his affidavit, as Exhibit "E", a copy of the notes of his telephone conversation with Ms. Guthro of December 11, 1984. These notes did not specifically refer to both complaints.

In paragraph 10 of his affidavit, Mr. McSween reiterated his ongoing understanding that: " . . . the fundamental basis for all settlement discussions with the parties . . ." was that : " . . . both complaints would be resolved together as part of the entire dispute between Ms. Guthro and Westinghouse"

In paragraph 14 of his affidavit, Mr. McSween referred to further settlement discussions between himself and Ms. Baker held in the spring of 1988, with respect to both complaints. Mr. McSween was attempting to obtain an offer to settle both complaints for \$12,000, with \$10,000 to be allotted to the first complaint and \$2,000.00 to the second complaint.

By letter dated May 12, 1988, counsel for the Respondent stated that it was agreeable to paying the Complainant the sum of \$6,500.00 (minus any deductions required by law) to settle both complaints. There is no doubt in my mind that counsel for the Respondent was attempting to settle both complaints and that her offers of settlement never contemplated

the settlement of only one of them. Based on representations from Mr. McSween and Ms. Haberman, there was no reason for counsel for the Respondent to imagine that anything other than a settlement of both complaints was being contemplated.

By letter dated December 20, 1988 to Ms. Baker, Ms. Haberman advised her that her "clients" were prepared to settle "this case" on the basis of a financial offer of \$7,500.00 payable to Ms. Guthro, a letter of assurance signed by the Respondent and the posting of additional Human Rights Code cards in the workplace, in accordance with the Respondent's offer of settlement. A copy of the said letter is attached as Appendix "R". It is significant that the reference line does not distinguish between the two complaints.

As a result of further settlement discussions, Ms. Baker informed Mr. McSween that she wished a guarantee from Merv Witter, the then regional manager from the Hamilton/Niagara region of the Commission that : " . . . the dispute would 'go away' if Westinghouse increased its offer to 7,500.00." Mr. McSween indicated that he would discuss the matter with his manager and Ms. Guthro. He was unable to communicate with Ms. Guthro (McSween affidavit paragraph 17).

By letter dated August 23, 1988, Ms. Baker wrote to Mr. McSween to confirm that she was authorized to increase the Respondent's financial offer to the Complainant from \$6,500.00 to

\$7,500.00.

Mr. McSween called Ms. Guthro on September 7, 1988 to advise her of the settlement offer of \$7,500.00 from the Respondent. Ms. Guthro rejected the offer because she believed that her loss should be calculated from 1972, rather than from 1981 as recommended by the Respondent. Ms. Guthro continued to be upset as a result of her belief that the representatives of the Commission had failed to handle her first complaint properly and was unwilling to meet with Mr. McSween to discuss the offer.

In paragraph 22 of his affidavit, Mr. McSween deposed:

On October 14, 1988, I wrote to Anne Molloy, Director of Legal Services for the Commission, to advise her of the settlement proposal received from Westinghouse. Since the Commission already had requested the appointment of a Board of Inquiry in this matter, I suggested that it may be necessary for counsel to meet with the complainant to discuss the respondent's offer. I thought that Ms. Guthro would benefit from hearing the perspective of the Commission counsel in respect of the reasonableness of the respondent's settlement offer. Attached hereto as Exhibit "O" is a copy of my memo dated October 14, 1988 to Anne Molloy.

The memorandum to Ms. Molloy is attached as Appendix "S". It is clear that, at this point, Mr. McSween's mind was directed to both complaints. I am not sure which complaints Ms. Guthro was directing her mind to at that time.

Mr. McSween was also in attendance at the December 13, 1988 meeting above referred to. Although he did not make any notes at the meeting, he recalled Ms. Guthro agreeing to accept the offer of settlement of \$7,500.00. Ms. Guthro does not deny this, the question is: What did she believe was the subject of settlement? Once again, I can accept Mr. McSween's evidence as to what took place at the meeting without finding that it undermined the Complainant's view of the settlement. Mr. McSween assumed that Ms. Guthro was operating under the same series of assumptions that he was. However, he said nothing to reinforce his position that both claims were being settled. In paragraph 20 of his affidavit, he indicates his view of the settlement as being entirely appropriate:

At this point, I viewed the settlement offer by Westinghouse as a reasonable resolution of Ms. Guthro's dispute with that company. The \$7,500.00 offer provided Ms. Guthro with full compensation for her loss during the 1981 to 1986 period arising from the refusal of her request for a promotion to department 156, and included an additional amount of almost \$2,000.00 as general damages. In addition, on the basis of information provided to me by counsel for Westinghouse, I was satisfied that Westinghouse was making good faith efforts to institute employment equity. I did not feel that it was reasonable to include any amount in respect of the other allegations made by Ms. Guthro against Westinghouse because the evidence from my investigation did not support these allegations (see paragraph 13 above). In addition, I had received a clear indication from Janice Baker that Westinghouse would vigorously pursue an argument before the Board that the events in the mid 1970's should not be considered since Ms. Guthro had delayed so long in bringing these matters to the attention of the Commission. I discussed the settlement with my manager, and he agreed that it was reasonable.

Mr. McSween's recollection of the December 13, 1988 meeting is set out in paragraph 23 of his affidavit:

On December 13, 1988, I attended a meeting with Joan Haberman, who had been appointed counsel for the Commission in this matter, and Ms. Guthro. I did not make any notes of this meeting. I recall that Ms. Guthro eventually agreed to accept the offer of \$7,500.00. I also recall that Ms. Haberman made it very clear to Ms. Guthro that she would be communicating Ms. Guthro's acceptance to counsel for Westinghouse, and that the matter was now at an end. I remember that Ms. Haberman repeated that statement several times. At no time during this meeting did Ms. Guthro give any indication that she wanted or intended to pursue the reprisal complaint. Further, even though after the meeting we drove back to Hamilton together and even though Ms. Guthro knew that I was the investigating officer responsible for the reprisal complaint, Ms. Guthro gave no indication that she would be contacting me in respect of the reprisal complaint. Ms. Guthro made no attempt to contact me about the reprisal complaint from the time of the meeting on December 13, 1988 until I left the Commission in July, 1989.

It is easy to see how Ms. Guthro, Ms. Haberman and Mr. McSween could honestly arrive at different conclusions as to what had been settled as a result of their different assumptions, and as a result of the fact that the only matter discussed was the first complaint. Ms. Haberman knew nothing about the particulars or the progress of the processing of the second complaint and assumed that it had been abandoned. I believe that Ms. Guthro had never abandoned her second complaint. The discussion with respect to the \$7,500.00 settlement was only related to the first complaint with no discussion taking place with respect to the second complaint. Mr. McSween believed that this was a good

settlement based on his evaluation of the second complaint, but the evidence does not disclose that this fact was ever communicated to the Complainant.

In paragraph 21 of Mr. McSween's affidavit, he states:

On September 7, 1988, I called Ms. Guthro to advise her of the settlement offer of \$7,500.00 from Westinghouse. Ms. Guthro rejected the respondent's offer on the basis that her loss should be calculated from 1972, rather than from 1981 as recommended by Westinghouse. Ms. Guthro was not willing to meet with me to discuss the respondent's offer. Attached hereto as exhibit "N" is a copy of my note dated September 7, 1988 of this telephone conversation with Ms. Guthro.

It therefore appears that during this September 7, 1988 telephone conversation with Ms. Guthro, Mr. McSween did not discuss the Respondent's or his views of the second complaint. He assumed that Ms. Guthro would interpret the offer as relating to both complaints.

I do not draw any particular significance from the fact that Ms. Guthro gave Mr. McSween no indication that she would be contacting him in respect of the second complaint from the time of the meeting of December 13, 1988, until he left the Commission in July of 1989. The matter was, by then, being dealt with by Ms. Haberman, and the Complainant regarded her as being the person to communicate with. As I have previously noted, the letter to Ms. Guthro of December 20, 1988 confirming Ms. Guthro's

being agreeable to accepting the Respondent's offer of \$7,500.00. only referred to the first complaint. In Ms. Guthro's letter to Ms. Haberman, after having received the Memorandum of Settlement dated June 22, 1989, Ms. Guthro made known the fact of her having been unaware that the second complaint was included in the settlement. I am satisfied that Ms. Guthro did not consider the discussions of December 13, 1988 as being related other than to the first complaint. Nor is there any indication that Mr. McSween had, as Ms. Haberman believed, shown Ms. Guthro copies of the settlement offers in written form when received from Westinghouse, which referred to both complaints.

I believe that Ms. Haberman's assessment of the situation, as contained in her letter to Mr. McSween of September 26, 1989, accurately reflects the true state of affairs. At that time Ms. Haberman realized that: " . . . as Mrs. Guthro was not directing her mind to the settlement of the second complaint, we have a real difficulty." The difficulty persists. On the facts, I find that Ms. Guthro, on December 13, 1989, had no reason to believe that the discussions between herself and Ms. Haberman involved a settlement of other than the first complaint. Ms. Haberman acknowledged as much, and the evidence supports Ms. Guthro's view of the matter.

Although prior to that time there was evidence to show that some of the settlement discussions involved both complaints, the subsequent correspondence to Ms. Guthro, and the character of

the settlement discussions involving her and Ms. Haberman. clearly indicate that she did not believe that she was settling both complaints, nor did she have any reason to believe that she was doing so.

I have a good deal of sympathy for the Respondent who behaved properly throughout the settlement negotiations. The fact that Ms. Guthro was not represented by other counsel at the time does not mean that she had, in some way, designated Commission counsel as her agent for the purpose of settling the complaints. In the letter of November 1, 1988, from Ms. Haberman to Ms. Baker, Ms. Haberman indicated that she was "making arrangements to obtain instructions from my clients and from the complainant with respect to your offers."

Counsel for the Respondent relied on a number of authorities relating to the authority of a solicitor to bind a client through the settlement of an action, notwithstanding a lack of actual authority. Counsel referred to the leading case of Scherer v. Paletta, [1966] 2 O.R. 524 (C.A.). In that case, the plaintiff retained a solicitor, other than the solicitor of record, to prosecute a counterclaim and instructed him to open negotiations for settlement. Although no notice of change of solicitor was filed, the material indicated that there was an oral retainer between the client and the solicitor. Negotiations were entered into between counsel appointed under the oral retainer and counsel for the defendant in an effort settle the

dispute. An offer was made by counsel for the defendant in the amount of \$15,000.00, together with an amount for costs. Counsel for the plaintiff advised his client of the offer and discussed the matter with him and recommended the settlement of the counterclaim. It was found that the client had verbally instructed his solicitor to press for an increased amount but to be prepared to settle the counterclaim for the amount offered. As a result of the efforts of counsel for the plaintiff, the counterclaim was settled over the phone and the settlement confirmed for \$17,500.00 plus \$2,000.00 for costs. The plaintiff's solicitor advised the plaintiff of the settlement in accordance with the offer but the plaintiff immediately repudiated it. After the defendant moved for judgment in favour of the plaintiff in the amount of the settlement, the application was dismissed. Leave to appeal was granted and the matter came before the Court of Appeal.

The Court noted a direct conflict between the solicitor and the client as to the exact instructions given. The client's position was that he had instructed the solicitor to submit any offer over \$15,000.00 for approval and that the amount of \$15,000.00 was unacceptable to him. The solicitor denied that any qualification had been put on his authority to accept an offer over \$15,000.00.

Counsel for the Respondent relied on the following statements, found at pp. 526-7 of the Scherer case:

The question for determination is whether the

defendant is entitled to enforce by way of a judgment the settlement agreed to by counsel for the plaintiff, in view of the dispute as to the limitation of the retainer of which he was unaware. The issue as to whether the retainer was or was not qualified is not before this Court for consideration.

Bowstead on Agency, 12th ed., pp. 65-6, reviews the scope of the implied authority of a solicitor and counsel and states that the relationship of a solicitor to his client is in general one of agent to principal.

The authority of a solicitor arises from his retainer and as far as his client is concerned it is confined to transacting the business to which the retainer extends and is subject to the restrictions set out in the retainer. The same situation, however, does not exist with respect to others with whom the solicitor may deal. The authority of a solicitor to compromise may be implied from a retainer to conduct litigation unless a limitation of authority is communicated to the opposite party. A client, having retained a solicitor in a particular matter, holds that solicitor out as his agent to conduct the matter in which the solicitor is retained. In general, the solicitor is the client's authorized agent in all matters that may reasonably be expected to arise for decision in the particular proceedings for which he has been retained. Where a principal gives an agent general authority to conduct any business on his behalf, he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority. As between principal and agent, the authority may be limited by agreement or special instructions but as regards third parties the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties. The scope of authority is, therefore, largely governed by the class of agent employed provided that he is acting within the limit of his ordinary avocation or by relation of the agent to the principal or by the customs of the particular trade or profession.

A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side

has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention if it sees fit; and, subject also to the disability of the client. It follows accordingly, that while a solicitor or counsel may have apparent authority to bind and contract his client to a particular compromise, neither solicitor nor counsel have power to bind the Court to act in a particular way, so that, if the compromise is one that involves the Court in making an order, the want of authority may be brought to the notice of the Court at any time before the grant of its intervention is perfected and the Court may refuse to permit the order to be perfected. If, however, the parties are of full age and capacity, the Court, in practice, where there is no dispute as to the fact that a retainer exists, and no dispute as to the terms agreed upon between the solicitors, does not embark upon any inquiry to the limitation of authority imposed by the client upon the solicitor.

Counsel for the Respondent also referred to the case of Thomson v. Gough (1977), 17 O.R. (2d) 420 (H.C.J.); Sylman v. Sylman (1986), 10 C.P.C. (2d) 231 (H.C.J.); Cambrian Ford Sales (1975) Ltd. v. Horner (1989), 69 O.R. (2d) 431 (Div. Ct.). All of the cases referred to indicate that the quoted statements from the Scherer case represent the law of Ontario.

Counsel for the Respondent also relied on a case decided by the Court of Appeal of Manitoba, Pearson v. Plester and Prairie Livestock Ltd., [1990] 1 W.W.R. 667. In that case, the Court, per Twaddle, J.A., in following the Scherer case, stated, at p. 670:

The leading authority in Canada is Scherer v. Paletta The issue in that case was virtually the same as in this. The Ontario Court

of Appeal held that the client was bound by the settlement made on his behalf by his solicitors. As to the alleged lack of authority, the Court said this through Evans, J.A. (as he then was) at p. 535:

If ... the parties are of full age and capacity, the Court, in practice, where there is no dispute as to the facts that a retainer exists, and no dispute as to the terms agreed upon between the solicitors, does not embark upon any inquiry as to the limitation of authority imposed by the client upon the solicitor.

More recently, in Cambrian Ford Sales (1975) Ltd. v. Horner (1989), 69 O.R. (2d) 431, the Ontario Divisional Court dealt with the issue again. Delivering the judgment of that Court, Chadwick J. had to say (at p. 437):

In our view, the law as stated by Evans, J.A. [in Scherer vs. Paletta, *supra*] makes it clear that the misapprehension as to the facts by the solicitor does not justify the court in setting aside or refusing to enforce a compromise. It is recognized that only a very small percentage of personal injury cases proceed by way of litigation and that by far a large portion are resolved by way of negotiations, settlement and releases. The parties are sui juris and there is no issue as to the capacity or other allegations which would affect the validity of the agreement. It is our view that the court should not go behind the contract or agreement and attempt to make a new settlement for the parties .

Eberle J. on behalf of the court in U.S. Billiards Inc. v. Carr (1983), 44 O.R. (2d) 591, 41 C.P.C. 221 (Div. Ct.), dealt with the question of the court reviewing settlement documents and stated as follows at pp. 592-3:

"I agree with him that the court is not approving a settlement nor passing on its merits in any way, in the ordinary case of a settlement where, as here, the parties are sui juris and the settlement asked for is not one which can have any effect on anyone other than the parties to the litigation itself. There may well be other types of cases where further material is needed than simply a writ of summons. But, as I have said, what is

asked for here is simply a money judgment and, in my view, in a case of this kind no more is required."

In referring to the "contrary point of view," Twaddle J.A. stated at pp. 671-2:

The contrary point of view appears to find support in Yannacopoulos v. Maple Leaf Milling Co. Ltd. (1962), 37 D.L.R. (2d) 562 (B.C.S.C.) and in Phillip v. Southam (1981), 9 Man. R. (2d) 413 (Man. Q.B.).

The first of these cases was one in which the terms of settlement involved the entry of a consent judgment dismissing the action. The Court was thus necessarily involved in giving effect to the agreement between the parties. What Ruttan, J. held was that, where the Court's order is contemplated by the agreement as a step in the settlement, the Court should not make its order without considering whether, in doing so, the Court might cause an injustice to a party.

Phillip v. Southam was a case in which the issue was whether the action should be dismissed for want of prosecution. It appears that the defendant sought, in the alternative, an order dismissing the action in lieu of discontinuance which, allegedly, had been agreed to. On this part of the application, Hewak J. (as he then was) held that the Court had jurisdiction to disregard the settlement agreement where it had been reached on the plaintiff's behalf by solicitors acting beyond their authority.

I do not find it necessary to say whether or not, in my opinion, Yannacopoulos v. Maple Leaf Milling Co. was correctly decided. It is distinguishable. But Phillip v. Southam is not. In my view, it was incorrectly decided on this point.

Yannacopoulos v. Maple Leaf Milling Co. was decided on the basis of the exception to the ordinary rule that solicitors acting within the scope of their apparent authority bind their clients. The exception was explained by the Earl of Halsbury, L.C. in Neale v. Gordon-Lennox, [1902] A.C. 465. He said (at p. 470):

Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone: the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of a Court of justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer -- to take it from the jurisdiction of the ordinary tribunal -- shall only be on certain terms, to say that any learned counsel can so far contradict what his client had said, and act without the authority of his client as to bind the court itself, is a proposition which I certainly will never assent to.

The exception is also referred to in Holt v. Jesse (1876). 3 Ch. D. 177 and in Shepherd v. Robinson. [1919] 1 K.B. 474. The limits of the exception were discussed in Little v. Soreadbury. [1910] 2 K.B. 658. In that case, referring to what was said in Neale v. Gordon-Lennox, Bray J. said (at p. 663):

It seems to me to be quite clear that the ground upon which the Lord Chancellor based his judgment in that case was that the party seeking to uphold the arrangement was coming to the Court to ask it to enforce by an order a certain thing being done and that he excepted altogether the case of a contract which can be carried out by the parties without the intervention of the Court for the purpose of saying that something shall or shall not be done.

The extent to which this exception applies to cases in which a court's intervention is a mere formality, as distinct from an exercise of its discretion, is a matter which need not detain us in this case. The settlement here required no order of the Court to give effect to it. The Court was called upon to give effect to it only when the plaintiff refused to be bound by it. The defendants might have commenced a separate action for breach of contract, but chose as a matter of procedural convenience to seek summary judgment in the existing action. The Court was not asked to lend its aid to give effect to the settlement: it was only asked to enforce the obligations which

the parties had taken upon themselves contractually.

Assuming, without deciding the point, that Ms. Haberman had been retained as the solicitor for the Complainant, or, at least as her agent for the purpose of arranging a settlement, I would find that the parties are of full age and capacity and I am satisfied that there was no dispute as to the terms agreed upon between the solicitors. On these facts, counsel for the Respondent submitted that I should follow the Scherer case and "not embark on any inquiry as to the limitation of authority imposed by the client upon the solicitor."

This is, however, not such a case as the Scherer case or the other cases relied upon by counsel for the Respondent. This is a case which is distinguishable from the Scherer case. In the Yannacopoulos case, referred to at p. 6 of the Pearson case, Ruttan, J. stated, at p. :

. . . where the Court's order is contemplated by the agreement as a step in the settlement, the Court should not make its order without considering whether, in doing so, the Court might cause an injustice to a party.

Although the Court in the Pearson case did not find it necessary to say whether or not the Yannacopoulos case was correctly decided, it was distinguishable. It was one of the exceptions " . . . to the ordinary rule that solicitors [or other agents] acting within the scope of their apparent authority

bind their clients [or principals]." At p. 672 of the Pearson case, the Court referred to the exception as explained by the Earl of Halsbury, L.C. in Neale v. Gordon-Lennox, [1902] A.C. 455, at p. 470, above referred to.

Reference was also made, at p. 672, to the reasons of Bray, J. in Little v. Spreadbury, [1910] 2 K.B. 658 (D.C.), referring to what was said in the Neale case in dealing with the exception. In the Pearson case, at p. 672, the Court noted that:

. . . The settlement here required no order of the Court to give effect to it. The Court was called upon to give effect to it only when the plaintiff refused to be bound by it. The defendant might have commenced a separate action for breach of contract, but chose as a matter of procedural convenience to seek summary judgment in the existing action. The Court was not asked to lend its aid to give effect to the settlement: it was only asked to enforce the obligation that the parties had taken upon themselves contractually.

In the case before me, the Commission has seen fit to request the appointment of a Board of Inquiry, and the Board was appointed on March 6, 1990. Unlike the cases cited to me, and which followed the Scherer case, I must view the alleged settlement in the light of the provisions of section 4 of the Statutory Powers Procedure Act, R.S.O. 1980 c. 484 (hereinafter, the "Act"):

4. Notwithstanding anything in this Act and unless otherwise provided in the Act under which the proceedings arise, or the tribunal otherwise directs, any proceedings may be disposed of by,

- (a) agreement;
- (b) consent order; or
- (c) a decision of the tribunal given.
 - (i) without a hearing, or
 - (ii) without compliance with any other requirement of this Act,where the parties have waived such hearing or compliance.

There is an impediment created by section 4 of the the Act, which prevents me from following the Scherer case.

Section 4 of the Statutory Powers Procedure Act provides for disposition of the proceeding without a hearing, in the circumstances of this case, only where the tribunal does not otherwise direct. The Court in the Scherer case understood the difference between the two cases above described. (See the extract from pp. 526-7 of that case, quoted above.)

This case is to be distinguished from a case where the tribunal does not have to be involved in the making of an order. On facts similar to those in Scherer, an action could have been brought to enforce the agreement rather than making an application for judgment.

The case before me is similar to the exception to the rule in Scherer. The fact that this case concerns a quasi-judicial tribunal does not, in my view, affect the principles discussed above which were pronounced in the context of court proceedings. This a case where I must exercise my discretion to dispose of the proceedings as requested by counsel for the Respondent.

As referred to in the Scherer case, at p. 527, in circumstances where the tribunal cannot be bound to act in a particular way, a Board of Inquiry can consider the want of authority " before the grant of its intervention is perfected and . . . may refuse to permit the order to be perfected."

In the case before me, the Respondent has behaved properly and in good faith in the settlement negotiations, and concluded, as a result of its dealings with the representatives of the Commission that its offer to settle both complaints had been accepted by the Commission and by the Complainant. At the same time, the Complainant, viewing the correspondence from Commission counsel and what transpired at the settlement meeting of December 13, 1988, reasonably understand the topic of settlement to relate solely to the first complaint. On the evidence, I could not find that the Complainant had led counsel for the Commission to believe that both of her complaints were

being settled. This is made clear from the affidavits of Ms. Haberman, and particularly her statements contained in her letter of September 26, 1990, to Mr. McSween.

As much as I sympathize with the position of the Respondent, I cannot overlook the fact that Commission counsel did not have authority to settle both complaints. Also, there is the fact that Ms. Haberman, in her letter to Ms. Baker of November 1, 1989, indicated that she was "making arrangements to obtain instructions from [her] clients and from the complainant with respect to [the] offers." This was some indication that the Commission was not representing Ms. Guthro. In Ms. Haberman's letter to Ms. Baker of December 20, 1989, the only reference is to Ms. Haberman's "clients" being "prepared to settle this case on the basis of . . . " the financial offer, with no reference to the Complainant. Nevertheless, I have decided the matter on the assumption that the Complainant was being represented by Ms. Haberman as counsel, without deciding whether she was.

Counsel for the Respondent also relied on the case of Bonnie Robichaud and Canadian Human Rights Commission v. Dennis Brennan and Her Majesty the Queen in Right of Canada as represented by Treasury Board (1990), 11 C.H.R.R. D/194, being a decision of the Canadian Human Rights Tribunal. In the headnote of that case it was stated, at p. D/195:

Summary: This is a decision of a Review Tribunal

regarding compensation for Bonnie Robichaud who was sexually harassed by Dennis Brennan, her supervisor while she was employed at the Department of National Defence.

The Supreme Court of Canada in its decision of July 29, 1987 found that the employer, the Department of National Defence, was liable for the discrimination of its employee, Dennis Brennan. It referred the complaint back to the Review Tribunal for a decision regarding compensation and other appropriate redress.

Before the Supreme Court of Canada's decision was handed down, Bonnie Robichaud and the Department of National Defence had entered into a private settlement. In this settlement, the Department of National Defence agreed to provide Ms. Robichaud three years' leave with pay, to find her an alternative appropriate position within the public service on her return, and to pay any moving expenses which might be required should she need to relocate for work.

The majority of the Review Tribunal finds that it cannot set the settlement aside, as Ms. Robichaud requests. However, it does find that the settlement does not finally close the question of remedy for harassment. Remedies under the Canadian Human Rights Act serve a broad public purpose and the Review Tribunal has the power, despite the settlement, to consider what further remedy may be needed.

In the Robichaud case, a private agreement had been entered into, which, if enforced, would have led to the withdrawal of Ms. Robichaud's complaint under the Canadian Human Rights Act and the acceptance by her of agreed to compensation as "full and final compensation to which she is entitled following the complaint filed against Mr. Brennan and the Department of National Defence alleging sexual harassment." The facts relating to the execution of the agreement in that case are very different from those that exist in the case before me. At page D/200.

these differences are clearly set out:

. . . It is indeed a valid, binding, and enforceable agreement. And we find the arguments advanced by Mrs. Robichaud suggesting the agreement was reached under conditions of duress, oppression, lack of adequate counsel, and undue pressure to be unconvincing. The evidence of Mrs. Robichaud herself clearly indicated that she was represented by counsel throughout, was advised and supported by PSAC, and received friendly advice from time to time from Dr. Marguerite Ritchie. By her own words, Mrs. Robichaud indicated satisfaction with the terms of the settlement, which permitted the continuance to the Supreme Court of Canada on the matter of employer liability, which was a matter of considerable importance to her. Mrs. Robichaud's counsel at that time, Mr. Scott MacLean, found the settlement to be generous, perhaps more so than could otherwise have been achieved. We cannot set the agreement aside on that issue.

In the case before me the Complainant never indicated her agreement to the settlement as applying to both of her complaints. The facts of the case before me are clearly distinguishable from those in the Robichaud case, where Mrs. Robichaud had indicated satisfaction with the terms of the settlement. Nor was there any indication that there was a federal counterpart to Section 4 of the Act.

There is a good deal of merit in either having a complainant indicate, in writing, the exact nature of the settlement that she or he is agreeing to, or to make the existence of a legally binding settlement with a complainant

conditional upon there being a settlement agreement in writing signed by the parties and approved of by the Commission. Such a settlement is contemplated in section 42 of the Code:

42. Where a settlement of a complaint is agreed to in writing, signed by the parties and approved by the Commission, the settlement is binding upon the parties, and a breach of the settlement is grounds for a complaint under section 31, and this Part applies to the complaint in the same manner as if the breach of the settlement were an infringement of a right under this Act.

It is unnecessary for me to decide whether the Code contemplates a valid and binding settlement as being restricted to one that has been reduced to writing, signed by the parties and approved by the Commission.

For all of the above reasons, the application of the Respondent is denied. I shall be communicating with the parties with a view to setting dates for the continuation of the hearing.

I would suggest that the Complainant consult with her counsel and consider the following matters before this matter proceeds to a hearing on the merits. It is obvious that the Commission, through its counsel, supports the "settlement" as being a fair one, treating it as having been offered to settle both complaints. Also, unless other representatives of the

Commission take a very different view of the matter than was indicated at the hearing on the Respondent's applications. It is unlikely that the Commission will appoint a Board of Inquiry with respect to the second complaint. An additional consideration is the fact that a Board of Inquiry cannot deal with Ms. Guthro's allegations against the Commission with respect to the way in which the first complaint was drafted.

It would be unfortunate if this matter were to proceed to a hearing on the merits without a thorough review of the implications arising from the matters referred to.

The Complainant is in not to be faulted for the position taken by her. There are, however, certain inherent problems for her in proceeding to a hearing on the merits. Should the Commission decide to maintain its position with respect to the fairness of the settlement as it applies to both complaints, the Complainant will be left with a considerable legal and financial burden (should she employ counsel at the hearing). In Keene Human Rights in Ontario, referred to above, the author states at p. 278:

. . . Where the Commission favours a settlement, it is free not to call evidence, and, presumably, to make submissions as to the suitability of the terms of settlement offered.

I do not make the above observations with the intention of dissuading the Complainant from proceeding to a hearing on the merits of her first complaint, or to have her refrain from pursuing her second complaint, but only to insure that she does so with full knowledge of the likely procedural course and the financial implications involved in making a decision to proceed with the hearing.

Should the hearing proceed on the merits, it will, of course, be restricted to the hearing of the first complaint. If the Complainant is successful, it does not follow that she will, at the very least, be entitled to the amount offered in the settlement. And, given the apparent position of the Commission, she may not be able rely on the support of the Commission, as would normally be the case.

Dated at Toronto this 17th day of October, 1990.



M.R. Gorsky - Board of Inquiry